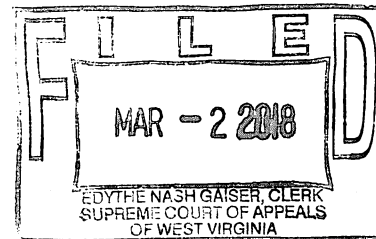


IN THE SUPREME COURT  
OF  
APPEALS OF WEST VIRGINIA



DOCKET NO. 16-0541

JOHN MICHAEL HOWELL  
Defendant Below

PETITIONER

v.

Wetzel County Case No. 11-F-15

STATE OF WEST VIRGINIA  
Plaintiff Below

RESPONDENT

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PETITIONER'S SUPPLEMENTAL BRIEF  
IN SUPPORT OF THE PETITION FOR REHEARING

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## ISSUE PRESENTED

Whether petitioner's plea agreement, which specifies eligibility for parole after no less than fifteen years of incarceration rather than the statutorily prescribed period of ten years of incarceration, set forth in West Virginia Code Chapter 61, Article 2, 14a, contains an illegal sentence.

## STATEMENT OF THE CASE

In the 2011 January term, a grand jury of Wetzel County, West Virginia returned an indictment charging the Petitioner with the felony offense of Kidnapping, the felony offense of Attempted Sexual Assault in the Second Degree, the felony offense of Sexual Assault in the First Degree, and the felony offense of Malicious Assault (See Appendix p. 14-17). Due to pretrial publicity, the trial of this matter was moved to the Circuit Court of Marshall County, West Virginia. After numerous delays, the trial of this matter began on January 5, 2016.

During the selection of the Jury, the Petitioner agreed to take a plea of kidnapping with mercy. (See Appendix p. 24) A plea bargain agreement was prepared that day and submitted to the Petitioner the same day. (See Appendix p. 18-22) The Plea Agreement provided that “The defendant will be eligible for parole after serving a minimum of fifteen years with credit for time served. The defendant understands that he may never be paroled, that matter will be left up to the Parole Board.” The Petitioner was then questioned by the Court concerning his understanding that the Petitioner would be eligible for parole after 15 years. (See Appendix p. 41) The record does not reveal that at any time the Petitioner was informed that under West Virginia Law a kidnapping with mercy would make him eligible for parole in ten years not fifteen. Furthermore, there is no indication in the record that he knowingly, intelligently and voluntarily waived his statutory right to be considered for parole after serving ten years.

Subsequent to the plea, Counsel for the Defendant, Mark Panepinto, discovered that the Petitioner had not been sentenced correctly and brought the error to the attention of the Court by letter dated March 31, 2016. (See Appendix p. 58-59) A hearing was

held before the Honorable Judge Arthur M. Recht, Special Judge for Wetzel County, West Virginia, in the Circuit Court of Marshall County. At said hearing, Judge Recht heard arguments concerning the original plea and sentencing order. The question of the error in sentencing concerning the eligibility of parole was specifically discussed. (See Appendix p. 88-101) The Court then denied the motion of the Petitioner and ruled that he would be eligible for parole after serving fifteen years of his sentence. (See Appendix p. 106-112)

## SUMMARY OF ARGUMENT

That the Sentence imposed upon the Petitioner for the offense of Kidnapping with mercy which provided that he would be eligible for parole in 15 years is illegal in that it is in derogation of West Virginia Code Chapter 62, Article 12, Section 14a, and West Virginia Code Chapter 62, Article 12, Section 13 which provides that the Defendant would be eligible for parole in 10 years.

## ARGUMENT

West Virginia Code Chapter 61, Article 2, Section 14a provides in part:

- (a) Any person who unlawfully restrains another person with the intent:
  - (1) To hold another person for ransom, reward, or concession;
  - (2) To transport another person with the intent to inflict bodily injury or to terrorize the victim or another person; or
  - (3) To use another person as a shield or hostage, shall be guilty of a felony and, upon conviction, shall be punished by confinement by the division of corrections for life, and, notwithstanding the provisions of article twelve, chapter sixty-two of this code, shall not be eligible for parole.
- (b) The following exceptions shall apply to the penalty contained in subsection (a):
  - (1) A jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole in accordance with the provisions of said article twelve;
  - (2) if such person pleads guilty, the court may, in its discretion, provide that such person shall be eligible for parole in accordance with the provisions of said article twelve, and, if the court so provides, such person shall be eligible for parole in accordance with the provisions of said article twelve in the same manner and with like effect as if such person had been found guilty by the verdict of a jury and the jury had recommended mercy.

This statute allows for a sentence of kidnapping for life without the eligibility of parole. However, it does allow for the recommendation of mercy which would allow for parole in accordance with West Virginia Code Chapter 62, Article 12, Section 13 provides in part:

(c) Except in the case of an inmate serving a life sentence, a person who has been previously twice convicted of a felony may not be released on parole until he or she has served the minimum term provided by law for the crime for which he or she was convicted. An inmate sentenced for life may not be paroled until he or she has served ten years, and an inmate sentenced for life who has been previously twice convicted of a felony may not be paroled until he or she has served fifteen years: *Provided*, That an inmate convicted of first degree murder for an offense committed on or after June 10, 1994, is not eligible for parole until he or she has served fifteen years.

The Petitioner, John Michael Howell has not been convicted of any felony other than the Kidnapping in the present case, therefore, by statute, he would be eligible for parole in 10 years. The sentence providing that he must wait a period of 15 years to be

eligible for parole is illegal and is contrary to West Virginia Code Chapter 62, Article 12, Section 14a, which provides the penalty for kidnapping and West Virginia Code Chapter 62, Article 12, Section 13(c) which is incorporated into West Virginia Code Chapter 62, Article 12, Section 14a by reference.

This Court has recognized that the proper method of correcting an unlawful sentence is the use of Rule 35(a) of the West Virginia Rules of Criminal Procedure. See *State v. Tex B.S.*, 236 W.Va. 261, 778 S.E.2d 710 (W.Va., 2015) and *State v. Donald B.*, No. 13–1205, 2015 WL 3751987 (W.Va. June 15, 2015). Rule 35(a) provides:

Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence.

The motion by Petitioner to correct the sentence in accordance with West Virginia law was timely and proper.

An illegal sentence is a sentence that is not authorized by law. The State Supreme Court of Tennessee has specifically defined an illegal sentence “as one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.” See Rule 36.1(a)(2) of the Tennessee Rules of Criminal Procedure. This Court has also recognized that a Circuit Court should not interfere with the jurisdiction of the Parole Board in matters involving Rule 35 of the West Virginia Rules of Criminal Procedure. “When considering West Virginia Rules of Criminal Procedure 35(b) motions, circuit courts generally should consider only those events that occur within the 120-day filing period; however, *as long as the circuit court does not usurp the role of the parole board*, it may consider matters beyond the filing period when such consideration serves the ends of justice.” (emphasis added) *State v. Head*, 198 W.Va. 298, 480 S.E. 2d 507 (1996) Syl. pt. 5. The sentence imposed on the Petitioner herein directly contravenes West Virginia

Code Chapter 62, Article 12, Section 14a which would make the Defendant eligible for parole after 10 years. Therefore, the sentence imposed upon the Defendant requiring him to serve 15 years before he is eligible for parole is unlawful.

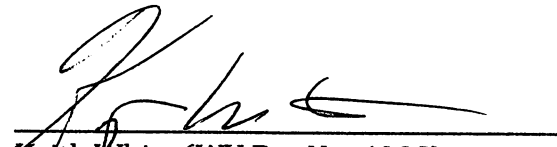
It cannot be argued that the Petitioner expressly waived his rights under the aforesaid statute. As the record indicates, the Petitioner was not informed by the Court, the Prosecuting Attorney nor his Counsel that he would be knowingly, intelligently, and voluntarily waiving a statutory right by entering into the plea agreement. There was no showing on the record that the Court or the parties were aware when the plea agreement was entered that the Petitioner would be eligible for parole in 10 years. The guilty plea itself would not constitute a waiver of an illegal sentence. See *United States v. Shulman* 940 F.2d 91 (4<sup>th</sup> Cir. 1991) in which the Court held that a challenge to the statutory right of a court to impose a particular sentence is not precluded by the guilty plea. See also *State v. Barnhart*, 2016 WL 6819051.

### CONCLUSION

As a result of the above, it is respectfully requested that the Order of the Circuit Court of Wetzel County, West Virginia, sentencing the Petitioner to Life Imprisonment with mercy and requiring him to serve 15 years before he is eligible for parole to be reversed and to be returned to the Circuit Court of Wetzel County for a correction of sentence in accordance with the laws of the State of West Virginia.

JOHN MICHAEL HOWELL

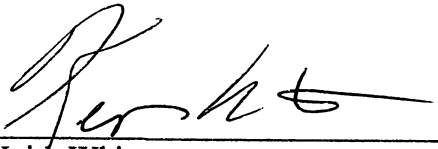
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## VERIFICATION

I, Keith White, Counsel for Petitioner John Michael Howell, named in the foregoing Appeal, being first duly sworn says that the facts and allegations contained in the foregoing instrument are true except where alleged to be based upon information and insofar as they are therein alleged to be based upon information, he believes them to be true.

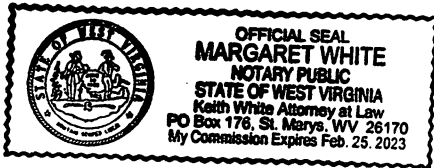
  
Keith White

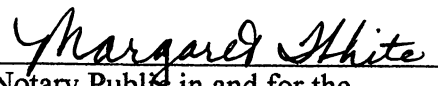
STATE OF WEST VIRGINIA,

COUNTY OF PLEASANTS TO-WIT:

Taken, subscribed and sworn to before me this 2nd day of March, 2018.

My commission expires: Feb. 25, 2023

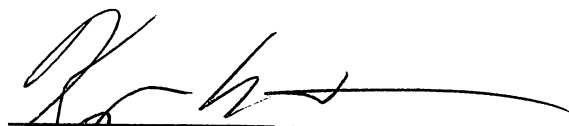


  
Notary Public in and for the  
County and State aforesaid.

## **CERTIFICATE OF SERVICE**

I hereby certify that on the 2nd day of March, 2018, true and accurate copy of the foregoing Petitioner's Supplemental Brief in Support of the Petition for Rehearing were deposited in the U. S. Mail contained in a postage paid envelope, addressed to Counsel for all other parties to this Appeal as follows:

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A handwritten signature in black ink, appearing to read 'Keith White', is written over a horizontal line.

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